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No. 94-3

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IN THE
Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

In *Harper v. Virginia Dept. of Taxation*, this Court held that its own decisions must apply retroactively, even if they announce new rules of law. This Court also declared that henceforth it would not permit the erection of selective barriers to the application of federal law in civil cases. In denying to Petitioners the retroactive application of *Bendix*

Autolite Corp. v. Midwesco Enterprises, Inc., by claiming that state courts could tailor their own remedies as they determined the manner in which a United States Supreme Court opinion was to be retroactively applied, the majority engaged in conduct that was clearly prohibited by *Harper v. Virginia Dept. of Taxation*, that being the erection of a barrier to the application of federal law.

The instant case presents no issues of remedy. The only issue is whether new law or old law applies to Respondent's personal injury action. Petitioners seek no remedy from the Courts for the violation of a novel constitutional rule. Having conceded that the rule of law set forth in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* applied to her action, Respondent is not entitled to any relief from this Court.

Although giving lip service to *Chevron Oil Co. v. Huson* as being "good law", it is clear that the Ohio Supreme Court thought to the contrary in light of its very limited analysis and application of the *Chevron Oil Co. v. Huson* factors. The "state grounds" upon which the Ohio Supreme Court presumably based its decision (Pet. App. A6-A10) have been conceded by the Respondent as being in error. (Res. Br. 4). Furthermore, although Respondent claimed substantial injury from the accident of March 5, 1984, suit was not filed until August 11, 1987, long after Respondent knew or should have known that O.R.C. §2305.15 had been declared unconstitutional.

ARGUMENT

I. *Harper v. Virginia Dept. of Taxation* Does Not Allow State Courts to Tailor Their Own Remedies as They Determine the Manner in Which a United States Supreme Court Opinion Is to Be Retroactively Applied.

The parties are today in agreement on certain of the issues present herein as well as passed upon by the Ohio Supreme Court. At the outset, there is agreement that *Harper v. Virginia Dept. of Taxation* established a clear rule of law that stated:

"... When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases."

125 L.Ed.2d 86 (Res. Br. 8).

Furthermore, there is agreement that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* retroactively invalidated O.R.C. §2305.15 (Res. Br. 8). Likewise, there is no question that *Harper v. Virginia Dept. of Taxation* overruled *Chevron Oil Co. v. Huson* to the extent that *Chevron Oil Co. v. Huson* rested on a choice-of-law rationale (Res. Br. 9).

It is equally clear that the third branch in support of the Ohio Supreme Court's ruling, *i.e.*, when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the U.S. Constitution, such as retroactivity, the state civil right prevails, was in error. Today, Respondent agrees

with Justice Thomas' admonition that the Supremacy Clause to the U.S. Constitution does not allow the federal retroactivity doctrine to be supplemented by the invocation of a contrary approach to retroactivity under state law (Res. Br. 4).

In *James B. Beam Distilling Co. v. Georgia* this Court declared that the *Chevron Oil Co. v. Huson* test could not determine choice-of-law by relying on the equities of the particular case. 115 L.Ed.2d 493. Accordingly, following the decision in *James B. Beam Distilling Co. v. Georgia*, if *Chevron Oil Co. v. Huson* had any continued vitality, it was only in the very limited context of a remedy analysis. However, as stated by Justice Souter:

"Once a rule is found to apply 'backward', there may then be the further issue of remedies..." (Emphasis supplied).

115 L.Ed.2d 481. Conversely, as reflected in the instant case, there may not be an issue of remedies.

Whatever vitality *Chevron Oil Co. v. Huson* may have had following *James B. Beam Distilling Co. v. Georgia* was put to rest when this Court decided *Harper v. Virginia Dept. of Taxation*. In *Harper v. Virginia Dept. of Taxation*, Justice Thomas stated that:

"... we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases"

125 L.Ed. 87.

The continued use of *Chevron Oil Co. v. Huson*, in the context of a remedy analysis, is nothing more than an attempt to avoid the clear prohibition of *Harper v. Virginia Dept. of Taxation* regarding the erection of barriers to the application of federal law in civil cases.

It is conceded by Respondent that *Harper v. Virginia Dept. of Taxation* compels the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (Res. Br. 10). *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was decided on the basis of a violation of the Commerce Clause to the U.S. Constitution, clearly an issue involving federal law in the civil arena. As stated in *Rivers v. Roadway Express*:

"It is this Court's responsibility to say what a statute means, and once it has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."

128 L.Ed.2d 289.

As a result of *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*, any resort to a *Chevron Oil Co. v. Huson* analysis will serve only to render meaningless the clear prohibition against the erection of selective barriers to the full application of federal law in the civil arena. As such, Respondent's argument that *Harper v. Virginia Dept. of Taxation* left undisturbed the remedial aspects of *Chevron Oil Co. v. Huson* is clearly contra to the holding in *Harper v. Virginia Dept. of Taxation*.

Following *Harper v. Virginia Dept. of Taxation*, what, if anything, was left of *Chevron Oil Co. v. Huson* after *James B. Beam Distilling Co. v. Georgia* was, as stated in the dissent of Justice O'Connor, abandoned. 125 L.Ed.2d 97. In commenting upon the demise of *Chevron Oil Co. v. Huson*, Justice Scalia, in concurring in *Harper v. Virginia Dept. of Taxation*, stated:

"2. Contrary to the suggestion in the dissent, I am not arguing that we should 'cast overboard our *entire* retroactivity doctrine with ... [an] unceremonious heave-ho.' Post, at _____, 125 L Ed 2d, at 99 (emphasis added; internal quotation marks omitted). There is no need. We cast over the first half six Terms ago in *Griffith*, and deep-sixed most of the rest two Terms ago in *James B. Beam Distilling Co. v. Georgia*, 501 US _____, 115 L Ed 2d 481, 111 S Ct 2439 (1991)—in neither case unceremoniously (in marked contrast to some of the overrulings cited in text). What little, if any, remains is teetering at the end of the plank and need no more than a gentle nudge. But if the entire doctrine had been given a quick and unceremonious end, there could be no complaint on the grounds of stare decisis; as it was born, so should it die."

125 L.Ed.2d 94, 95.

While the majority of the Ohio Supreme Court was correct in alluding to the fact that *Harper v. Virginia Dept. of Taxation* had replaced the *Chevron Oil Co. v. Huson* test (Pet. App. A6), it was incorrect in its application of *Harper v. Virginia Dept. of Taxation*. To the extent that state court "tailored remedies", or what might also be called "selective temporal barriers", stand in the way of the full application of federal law in civil cases, such "tailored remedies" must fail. Just as the majority's reliance upon the Ohio Constitution (Pet. App. A7) was in error, so also was its conclusion that *Harper v. Virginia Dept. of Taxation* allowed state courts to tailor their own remedies as they determined the manner in which a U.S. Supreme Court opinion was to be retroactively applied.

II. Remedy Doctrines Are Not Applicable Herein. The Only Issue Is Whether New Law or Old Law Applies to Respondent's Personal Injury Action.

As previously noted, Respondent has made several concessions that signal abandonment of the decision of the Ohio Supreme Court (Res. Br. 4, 8, 9, 10). Despite Respondent's additional concession that "very different remedial considerations" apply in tax refund cases (Res. Br. 7), Respondent essentially asks this Court to adopt the reasoning of Part III of Justice O'Connor's dissent in *Harper v. Virginia Dept. of Taxation*. 125 L.Ed. 97. But Respondent goes much further than Justice O'Connor by arguing for the application of the doctrine of constitutional remedies in a case in which the issue of remedies never arises. Respondent's recasting of the facts, the law and Petitioners' argument cannot obscure the extraordinary nature of the relief Respondent seeks. Respondent asks this Court not only to provide "remedies" to parties who have suffered no constitutional insult, but to permit "remedies" that require the enforcement of an unconstitutional statute.

A. "Remedies" Are Not at Issue in This Case, Where There Was No "Victim of a Constitutional Violation".

The doctrine of constitutional remedies seeks to provide "effective redress to individual victims of a constitutional violation". Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1736. As with any other form of remedy, the doctrine of constitutional remedies comes into play only when a duty has been breached, resulting in damages. In the context of tax refund

litigation, the doctrine requires states to provide an adequate remedy for taxpayers compelled to pay taxes under an unconstitutional statute. See, generally, *Reich v. Collins*, 63 U.S.L.W. 4032. The remedy for those damages may¹ vary according to whether the breach was determined in hindsight, on the basis of an unforeseeable change in the law.

Here, no remedy was sought by, or granted to, a "victim of a constitutional violation". Remedy doctrines are therefore irrelevant.

In the trial court, Petitioners moved to dismiss Respondent's Complaint as untimely. Respondent opposed the motion, claiming that her action was "saved" by O.R.C. §2305.15. While the motion was pending, this Court determined that O.R.C. §2305.15 was unconstitutional. That ruling applied to Respondent's pending case—not as a "remedy" for Petitioners, but as a controlling federal precedent.

The effect of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was to eliminate Respondent's defense to the motion to dismiss. The only remaining applicable statute was Ohio's two-year statute of limitations for personal injuries. Since that statute had expired, Respondent had no cognizable claim as a *matter of law*, not on the grounds of equity or remedy.

In the Ohio Supreme Court, Respondent argued that her "reliance" on O.R.C. §2305.15 entitled her—the potential *beneficiary* of an unconstitutional statute—to a "remedy" in the form of selective prospectivity. The Ohio Supreme Court agreed and this Court accepted jurisdiction.

¹ Because "remedy" is irrelevant, this Court need not consider when, if ever, equitable considerations will influence the remedy available for constitutional torts.

Respondent now tries to recast the case and Petitioners' argument by claiming that Petitioners sought and were denied a "remedy" for a constitutional violation. Petitioners asserted no cause of action based upon conduct that was lawful at the time the tort was committed. Petitioners paid no unconstitutional tax. Petitioners simply asserted that Respondent's claim was time-barred and O.R.C. §2305.15 did not save it.

Contrary to Respondent's assertions, Petitioners do *not* argue before this Court that their "Due Process" rights were violated by the Ohio Supreme Court's refusal to grant Petitioners a remedy for a constitutional violation.² Rather, Petitioners argue that the Ohio Supreme Court improperly granted Respondent the "remedy" of selective immunity from the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The doctrine of constitutional remedies applies only to aggrieved parties seeking redress for constitutional violations after prevailing on the constitutional question. Even Justice O'Connor believes only that courts should be given:

² Respondent cites to pp. 41-43 of Petitioners' Brief for this mischaracterization of Petitioners' argument. *Nowhere* on those pages do Petitioners claim a Due Process violation. Respondent bases an entire section of her Brief (Res. Br. at 28-30) on the false assertion (Res. Br. at 28) that Petitioners cite *McKesson v. Div. of Alc. Bev.* on p. 42 of their Brief to discuss "the permissibility of state-imposed remedial limitations". Page 42 of Petitioners' Brief merely points out that the Ohio Supreme Court's opinion constitutes "the wrongful validation of an unconstitutional statute under the guise of '... fashioning appropriate relief.'" *Harper v. Virginia Dept. of Taxation*—not *McKesson v. Div. of Alc. Bev.*—is cited in support.

"... the ability to avoid injustice by taking equity into account when formulating the remedy for violations of novel constitutional rules." (Emphasis supplied).

125 L.Ed.2d 112.

This case presents only the issue of whether new law or old law applies to Respondent's personal injury action. Petitioners seek no remedy from the courts for the violation of a novel constitutional rule. Having conceded that the rule of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* applied to her action, Respondent is entitled to no relief from this Court.

B. Selective Prospectivity Is Not a Viable Form of Remedy.

The Ohio Supreme Court found Respondent and a select group of Ohio citizens to be immune from the rule of law established by this Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Even if this were a case that invoked "remedies", the Ohio Supreme Court's choice of selective prospectivity as a remedy (or a "limitation" of remedy) should be reversed.

In her dissent to *Harper v. Virginia Dept. of Taxation*, Justice O'Connor implicitly acknowledged that the "remedy" she advocated was inseparable from "choice of law". To deny the taxpayers relief for their claim of a constitutional violation, courts would either have to go back and hold that *Davis v. Michigan Department of the Treasury* applies prospectively only, or condone the practice of selective prospectivity. *Harper v. Virginia Dept. of Taxation* (Justice O'Connor, dissenting) at 125 L.Ed.2d 112 (because "the Constitution permits this

Court to refuse plaintiffs full backwards-looking relief", state courts should have the same leeway). The majority of this Court, however, firmly rejected the doctrine of selective prospectivity; it cannot be revived under the guise of "remedy".

C. Other Remedy Doctrines Are Irrelevant.

Implicitly recognizing that this case is not about the doctrine of constitutional remedies, Respondent argues a slew of "analogous" doctrines—some related to different kinds of constitutional issues and some related to how states and the common law create and apply statutes of limitations. None are relevant.

This case is not concerned with the effect of constitutional rulings on consummated transactions. Even if it were, the Ohio Supreme Court did not adopt an equitable remedy that would mitigate the harsh consequences of the new rule. It did not, for example, order rescission of a newly invalidated contract over money damages. Here, the Court below simply refused to apply the new law.

Nor is this case about equitable tolling doctrines, waiver, estoppel or laches. All of those doctrines are based on equity's refusal to aid a wrongdoer. Here, the conduct of the parties is not at issue. The only issue is the applicability of "new law".

Finally, this case does not involve a legislature's right or ability to pass statutes that revive expired limitations periods. Legislatures create, repeal and revive statutes of limitations. Courts simply interpret, invalidate or enforce them.

In sum, Respondent can present no authority to support the judgment of the Ohio Supreme Court. It is not a matter for a remedy, because there are no aggrieved parties seeking redress for violation of their constitutional rights. It is not about protecting previously immune public officials from personal liability for "new" constitutional torts, delaying the effective date of injunctive relief to give school systems time to formulate a desegregation plan, or determining whether *Chevron Oil Co. v. Huson* factors will continue to be relevant under the doctrine of pure prospectivity.

This case is about whether Ohio courts can refuse to apply controlling federal law to a select group of citizens who allegedly "relied" on an unconstitutional statute. This case asks the question of whether state courts can invoke "equity" or "remedy" as a basis for enforcing statutes that violate the Commerce Clause. They cannot.

III. At the Time of Filing Her Complaint, Respondent Knew or Should Have Known That O.R.C. §2305.15 Was Unconstitutional.

Respondent has devoted considerable effort to justify why the three tests discussed in *Chevron Oil Co. v. Huson* have applicability herein, something that the Ohio Supreme Court failed to do when it passed upon the identical issue. Although Respondent argues that the Ohio Supreme Court correctly concluded that each of the *Chevron Oil Co. v. Huson* tests supported its decision (Res. Br. 31), it is clear from the record that the majority's efforts were quite limited (Pet. App. A6).

The Ohio Supreme Court's somewhat skeptical view of *Chevron Oil Co. v. Huson* was evident when it stated:

"Whether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision."

Pet. App. A6.

In commenting upon the majority's analysis and subsequent reliance upon *Chevron Oil Co. v. Huson*, the dissent correctly stated:

"It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

Pet. App. A10.

The "state grounds" referenced by the dissent (Pet. App. A6-10) have been conceded by the Respondent as being in error (Res. Br. 4).

Respondent and/or her counsel knew or should have known that the U.S. District Court for the Northern District of Ohio, Western Division, March 5, 1984, and the U.S. Court of Appeals for the Sixth Circuit, June 3, 1987, had declared Ohio's tolling statute unconstitutional. As such, there can be no realistic "justifiable reliance" upon a statute that had been declared unconstitutional. Furthermore, the case precedent relied upon by the Respondent ends with the year 1983 (Res. Br. 34, 36). *Copley v. Heil-Quaker* was decided on March 8, 1984 whereas the U.S. Court of Appeals for the Sixth Circuit's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was rendered on June 3, 1987. Respondent's Complaint was not filed until August 11, 1987.

CONCLUSION

For the reasons advanced herein, Petitioners respectfully request this Court to reverse the decision of the Ohio Supreme Court and to enter final judgment in favor of Petitioners.

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